

**FLATHEAD COUNTY PLANNING AND ZONING OFFICE**  
**CONDITIONAL USE PERMIT REPORT (#FCU-20-04)**  
**SCHELLINGER CONSTRUCTION**  
**May 5, 2020**

**I. GENERAL INFORMATION**

**A. Project Description**

This is a report to the Flathead County Board of Adjustment regarding a request from Rob Koelzer, Schellinger Construction Co. on behalf of Section 16 Family Limited Partnership to modify a condition of approval from previously approved Conditional Use Permits (FCU-05-07, FCU-08-07) to allow concrete and asphalt batch plants on an existing gravel extraction operation.

**B. Application Personnel**

**1. Owner**

Section 16 Family Limited  
Partnership  
2335 West Valley Drive  
Kalispell, MT 59901

**2. Applicant**

Rob Koelzer, Schellinger Construction  
Co.  
P.O. Box 39  
Columbia Falls, MT 59912

**C. Process Overview**

**1. Land Use Advisory Committee/Council**

The proposed land use is located within the West Valley Land Use Advisory Committee jurisdiction. The West Valley Land Use Advisory Committee will hold a public meeting to review this proposal and forward a recommendation to the Board of Adjustment on May 21, 2020 at 5:30 P.M. at the Expo Building at the Flathead County Fairgrounds. This space is reserved for an update of that meeting.

**2. Board of Adjustment**

This request was originally scheduled for the May 5, 2020 Board of Adjustment hearing. Because of the multitude of public comments received after the adjacent property owner mailing was received, requesting this item be heard first by the West Valley Land Use Advisory Committee, this request was postponed until the June Board of Adjustment meeting in order to receive a recommendation from the committee.

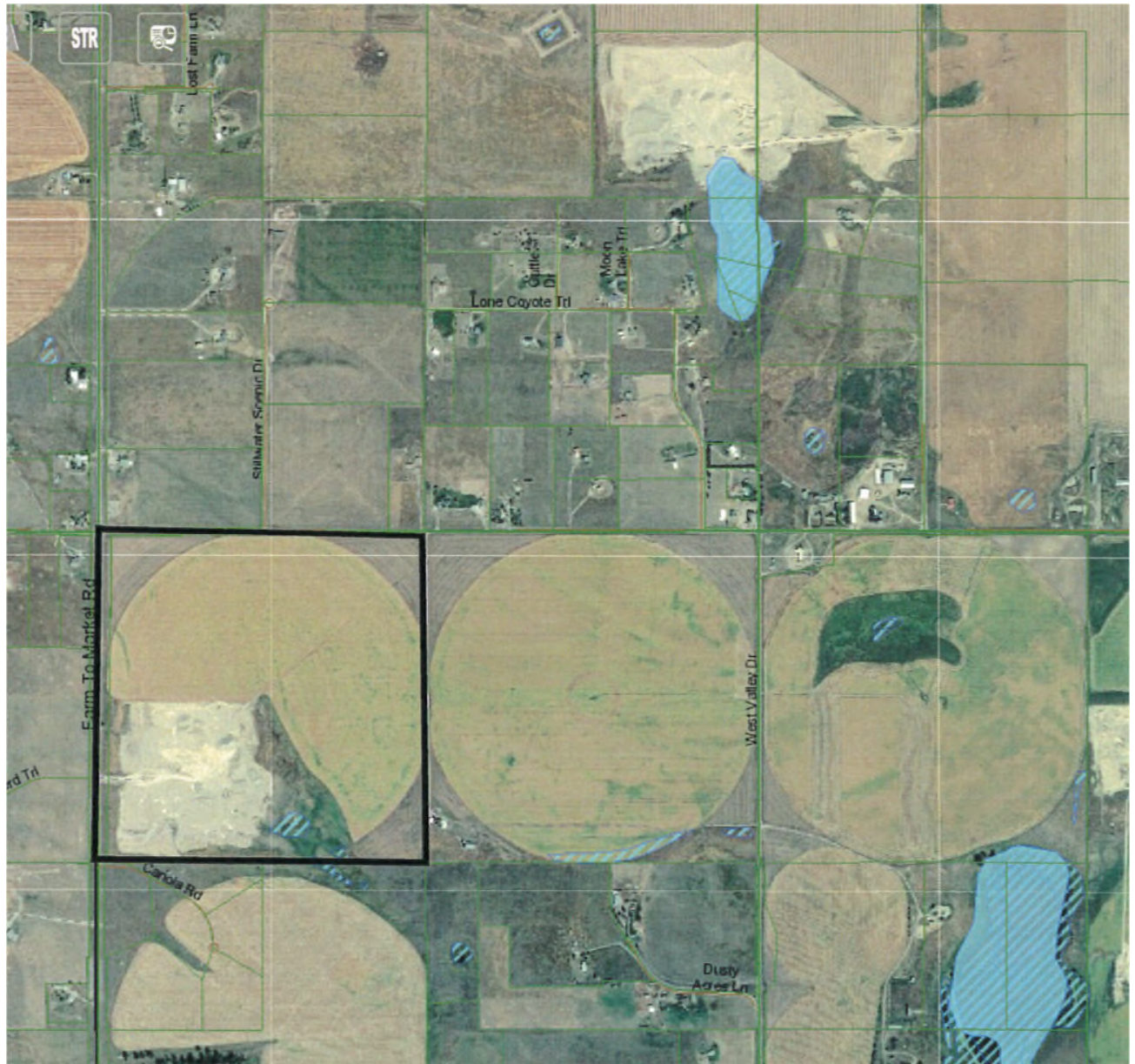
The Flathead County Board of Adjustments will conduct a public hearing on the proposed zoning map amendment on June 2, 2020 via telephone conferencing platforms. Documents pertaining to this file are available for public inspection in the Flathead County Planning and Zoning Office, located on the second floor of the South Campus Building.

**II. PROPERTY CHARACTERISTICS**

**A. Property Location and Size**

The subject property is located at 3427 Farm to Market Road west of Kalispell, MT (see Figure 1 below). The property is 160 acres and can legally be described as the northwest quarter of Section 16, Township 29 North, Range 22 West, P.M.M., Flathead County, Montana.

**Figure 1:** Subject property (outlined in black)



**B. Existing Land Use(s) and Zoning**

The property is currently under agricultural production and is being utilized as a gravel extraction operation. The property is zoned 'WV West Valley.' West Valley is defined as, "A district to promote orderly growth and development in the West Valley area consistent with the community vision statements as expressed by the text and map exhibits of the West Valley neighborhood Plan, County Resolution #1226-A."

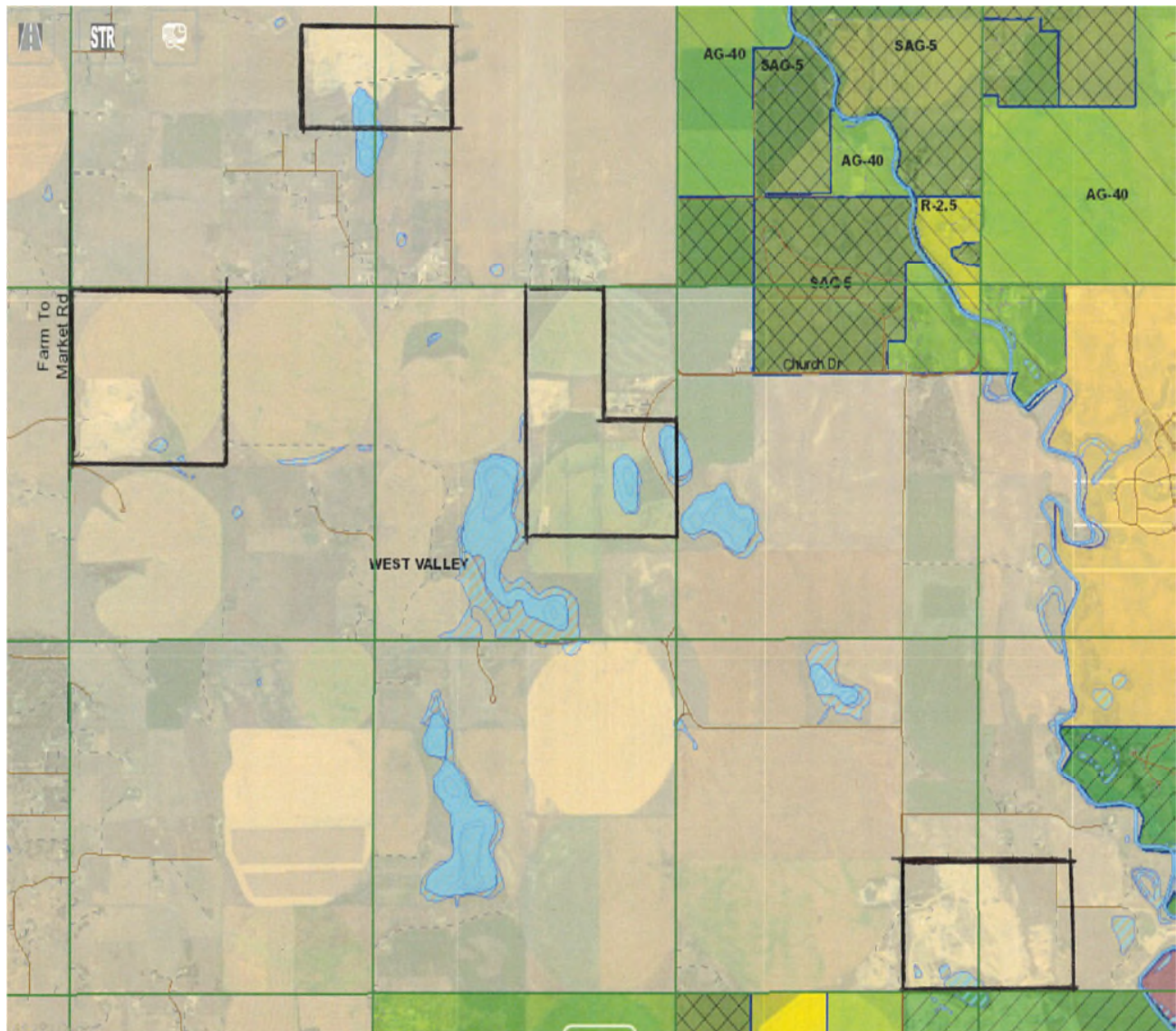
**C. Adjacent Land Use(s) and Zoning**

The property is surrounded by property also zoned West Valley. The prominent land use in close proximity to the property appears to be agriculture and single family dwellings on large parcels. There is a newly developed subdivision adjacent to the south and another new



subdivision across Farm to Market Road. There are three other gravel extraction operations within three miles of the subject property all zoned West Valley.

**Figure 2:** Zoning surrounding the subject property and nearby gravel operations (outlined in black)



#### **D. Summary of Request**

The original Conditional Use Permit for the gravel operation was approved on June 14, 2005. The approval was appealed in District Court. The Court rendered a decision that was appealed to the Montana Supreme Court. Ultimately, a Stipulated Consent Decree and Final Judgement was issued on November 22, 2010. While the approval was in litigation, several text amendments were made to the Flathead County Zoning Regulations regarding gravel extraction operations, residential areas, the status of the Growth Policy and neighborhood plans as they relate to regulations that were all issues brought up by the Court during the litigation proceedings.

With that said, this particular application is requesting a modification of one of the conditions of approval of the original permit (FCU-05-07). That condition reads, “Asphalt and concrete

batch plant operations are prohibited.” This request is to modify that condition in order to be permitted to operate portable asphalt and concrete batch plants in this gravel operation. It should be noted that “gravel extraction” is a conditional use in the West Valley zoning district. At the time of the original approval, there was no definition of “gravel extraction” in the regulations. On March 1, 2010, the regulations were amended to include a definition which reads, “Gravel Extraction– includes the following activities, if they are conducted for the primary purpose of sale or utilization of materials: 1) removing the overburden and mining directly from the exposed natural deposits or mining directly from natural deposits of materials; 2) mine site preparation, including access; 3) processing of materials within the area that is to be mined or contiguous to the area that is to be mined or the access road; 4) processing materials within the area that is to be mined through crushing, screening, asphalt, wash, and concrete plants, and utilizing other equipment used in processing open-cut materials; 5) transportation of materials on areas referred to in subsections 1 - 3; 6) storing or stockpiling of materials on areas referred to in subsections 1 - 3; 7) reclamation of affected land; and 8) any other associated surface or subsurface activity conducted on areas referred to in subsections 1 - 3.”

This request is only to modify that condition. The rest of the conditions outlined in FCU-05-07 and the Stipulated Consent Decree and Final Judgement will remain in effect. In addition, the applicant has gone through the process with the Department of Environmental Quality to extend the mining operation to include approximately 80 acres. Moreover, there is at least one other gravel extraction operation in close proximity that has been permitted to include batch plants. It should be noted that these operations were issued Conditional Use Permits after the litigation for this particular operation had concluded and the associated amendments to the zoning regulations were adopted.

There were a multitude of issues considered by the Court during the litigation of the appeal of the approval of FCU-07-05. Many of those issues are outlined in more detail in the attached Exhibit A of this report. This exhibit which is the staff report for FCU-08-07 reviews, in depth, issues regarding traffic and water quality concerns the District Court ruled were lacking in the original FCU-05-07 report and findings of fact. It should be noted that the finding adopted by the Board of Adjustment regarding traffic issues and the quality of the transportation network is discussed in the attached exhibit is for the current operation that does not include asphalt and concrete batch plants. Later in this report, traffic issues are evaluated only for the anticipated increase in traffic as a result of the requested portable asphalt and concrete batch plants. As to water quality issues, additional information was considered by the Board of Adjustment at that time and additional finds were adopted regarding water quality for the current operation. With this request, the Planning and Zoning Department will rely on the expertise of the Department of Environmental Quality to administer all appropriate environmental safeguards for the operation of asphalt and concrete batch plants.

With that said, there are three issues that were addressed by both the District and Supreme Court that have appeared to generate a fair amount of attention in the public comments received so far regarding this request. It is anticipated that these issues will be routinely mentioned in both the West Valley Land Use Advisory Committee meeting as well as the Board of Adjustment hearing. The first issue is the Supreme Court determination that West Valley is a residential zone. This is important because both Montana Code Annotated and the Flathead County Zoning Regulations specifically requires gravel operations in residential area, including asphalt and concrete batch plants, to be critically review during the Conditional Use Permit process and even denied if the Board so decides. And while there was considerably less residential development in close proximity to this operation in 2007, since that time, and

indeed, within the last two years, two residential subdivisions have been developed in the area. Lost Hills subdivision consists of six residential lots and is located immediately adjacent to the gravel operation to the south. The other subdivision, Homes on a Thousand Hills is a ten lot residential subdivision located on the west side of Farm to Market Road with the subdivision road directly across the road from the gravel operation entrance. The fact that the area has become increasingly residential has the potential to have additional immediate neighborhood impacts that will need to be mitigated in order to approve this request.

The second issue the District Court grappled with was at the time of the original application, gravel extraction was a conditional use in the West Valley zone but there was not a definition of “gravel extraction” anywhere in the regulations. There was, however, a definition of “extractive industry” which states, “Commercial or industrial operations involving the removal and processing of natural accumulations of sand, rock, soil, gravel, or any mineral.” At that time, the Board of Adjustment implicitly concluded that gravel extraction and extractive industries were synonymous. One of the reasons this request was remanded to the Board of Adjustment and what is discussed in Exhibit A was to adopt an appropriate finding related to these two terms. However, as noted above, a definition of gravel extraction was adopted into the Flathead County Zoning Regulations on March 1, 2010. This definition appears to include not only the existing gravel operation on the subject property but also includes the potential addition of asphalt and concrete batch plants.

The final issue that was discussed in the Supreme Court decision and that is mentioned in more than a few comments regarding this request is the function of the West Valley Neighborhood Plan and whether that plan has any regulatory authority. At the time of the original approval of FCU-05-07, Section 1.04.020 of the Flathead County Zoning Regulations stated, “In cases where a neighborhood plan, addendum to a Master Plan, or other adopted document contains aspects related to zoning and is under the jurisdiction of these regulations, the provisions that are more restrictive shall control.” It was argued at the time and it is still argued that the West Valley Neighborhood Plan contemplates “industrial” development or activity only if that industrial activity is very closely related to agricultural operations. And while the gravel operation is being conducted on a portion of a parcel of land that is also under agricultural production, the gravel operation is certainly not closely related to any kind of agricultural operation. Indeed, in its decision, the Supreme Court referenced Section 76-1-605(2) M.C.A. which states, “(a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law. (b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.” In its 2008 decision, the Supreme Court ruled that the zoning regulations in effect at the time of FCU-05-07 approval specifically authorized regulatory functions of the West Valley Neighborhood Plan.

On October 9, 2008, the Board of Commissioners adopted a text amendment to the zoning regulations specifically dealing with this issue. Section 1.04.020 now states, “The growth policy and neighborhood plans are not regulatory and do not confer any authority to regulate. The growth policy and neighborhood plans are intended to provide direction and guidance when consideration is given to adopting, amending, and interpreting zoning regulations.” This regulation change stripped the growth policy and any neighborhood plans the authority to regulate.

### **III. COMMENTS**

#### **A. Agency Comments**

Because the request is to modify one condition of approval of a previously approved Conditional Use Permit, staff did not deem it necessary to solicit agency comments.

#### **B. Public Comments**

1. Notification was mailed to property owners within 150 feet of the subject property on May **XX**, 2020, pursuant to Section 2.06.040(3) of the Flathead County Zoning Regulations. Legal notice of the public hearing on this application will be published in the May **XX**, 2020 edition of the *Daily Interlake*.

2. **Public Comments Received**

To date, the Department has received in excess of 70 public comments regarding this request. The comments received so far will be provided to both the West Valley Land Use Advisory Committee and the Board of Adjustment. To briefly summarize the comments, the vast majority stated opposition to the request and requested the May hearing be postponed until June. There was one comment in favor of the request. It is anticipated any individual wishing to provide public comment on the proposal will do so during the public hearing scheduled for June 2, 2020. Any written comments received following the completion of this report will be provided to the Board and summarized during the public hearing. It should be noted that due to the novel coronavirus, the Board of Adjustment hearing will take place via teleconferencing. Any written comments received prior to Board information material mailed to the Board members will be included with the other application materials. Any written comments received after the Board receives the application information will be read into the record during the hearing.

### **IV. CRITERIA REQUIRED FOR CONSIDERATION**

Per Sections 2.06.080 and 2.06.100 of the Flathead County Zoning Regulations, what follows are criteria required for consideration of a Conditional Use Permit and suggested findings of fact based on review of each criterion.

Section 2.06.050(2) of the Flathead County Zoning Regulations states, “ A minor modification to a previously approved Conditional Use Permit may be granted by the Zoning Administrator if it is determined that the requested modification would not constitute a substantial change to the findings of fact in the original approval, and that the proposed location, size, design, and operating characteristics of the proposed use and the original conditions of approval would not be altered or be detrimental to the public health, safety, or general welfare. The Zoning Administrator shall deny the requested modification upon finding the request constitutes a substantial change. In such cases, the applicant may apply for approval of a use or condition modification, as appropriate, in accordance with the procedures set forth in this section.”

The Zoning Administrator determined that because asphalt and/or concrete batch plants were specifically prohibited with the original request, the condition modification request constitutes a substantial change. However, because of the complexity of how the original Conditional Use Permit ultimately received approval and because of the evolution of Planning and Zoning Department staff over the past fifteen years, the original Findings of Fact are, for the most part, either not applicable or do not contain adequate information. Moreover, as mentioned above, changes were made to the zoning regulations as a result of this original request.

Because this request is to modify one condition of approval of a previously approved Conditional Use Permit, review of the required criteria will exclusively focus on the requested change of the condition that asphalt and concrete batch plants are prohibited. In addition, the Findings of Fact will also concentrate exclusively on the request to modify that condition.

## **A. Site Suitability**

### **1. Adequate Usable Space**

The subject property is approximately 160 acres in size. The current Open Cut Mining approval from DEQ includes approximately 80 acres. The site has been a gravel extraction operation for over ten years and appears to meet all of the requirements outlined by DEQ. The addition of asphalt and concrete batch plants should not alter the current or future activities on the site. Moreover, there also appears to be adequate useable space on the site.

**Finding #1** – The subject property appears to contain adequate usable space because the area which has been permitted by DEQ is approximately 80 acres which appears to be adequate for portable asphalt and concrete batch plants as well as the on-going gravel extraction operation.

### **2. Adequate Access**

Access to the property is from Farm to Market Road and will not change if this modification is granted.

**Finding #2** – The access appears adequate because the access to the property will not change.

### **3. Absence of Environmental Constraints**

The property is not located within a Special Flood Hazard Area nor does it appear there are any other environmental constraints on the property.

**Finding #3** – There does not appear to be environmental constraints on the property because it is not located within a Special Flood Hazard Area and there does not appear to be any other environmental constraints in the area.

## **B. Appropriateness of Design**

### **1. Parking Scheme**

It appears the nature of the operation does not require specific parking for on-site employees. There is a limited number of pieces of heavy equipment that removes the material and loads trucks to transport the material off site. However, if, with the development of batch plants there is a need for employee parking, the site plan indicates there is ample room on the existing pit floor for employee parking.

**Finding #4** – Any future parking scheme appears to be acceptable because there will be a limited amount of on-site employees requiring parking spaces and the existing pit floor is approximately 30 acres.

### **2. Traffic Circulation**

Traffic circulation for the haul trucks which transports materials off site appears to be confined to the southwest portion of the current operation. As the operation progresses to other portions of the property, that circulation will be modified to meet the conditions of the operation. Moreover, it also appears that there are a limited number of vehicles on the property at any given time.

**Finding #5** – The proposal appears to accommodate traffic circulation for the proposed use because there is ample room on the property for the limited number of vehicles to circulate in an efficient manner.

**3. Open Space**

The subject property is approximately 160 acres in size and is currently being utilized as a gravel extraction operation and for agricultural production. The current mining activity is confined to 40 acres on the southwest portion of the property. The applicant has updated the Open Cut Mining Permit to include an additional 40 acres adjacent to the north of the existing operation. This update was issued by DEQ in 2019. When this section begins gravel production, there will still be 80 acres of open space on the property. It should also be noted that the applicant submitted a draft Open Cut Mining Permit to include the asphalt and concrete batch plants. If this request is approved, they will submit the permit to DEQ for their consideration.

**Finding #6** – The proposed open space on the subject property appears adequate because when expanded, only 80 acres of the 160 acres will be under gravel extraction operations.

**4. Fencing/Screening**

There is currently fencing around the perimeter of the property along with an earthen berm with vegetation.

**5. Landscaping**

There is currently an earthen berm with vegetation around the entire area of the current and future mining operation such that the operation is somewhat buffered from Farm to Market Road or adjacent properties

**Finding #7** – The current fencing/screening and landscaping on the subject property appears appropriate because there is fencing around the perimeter of the property and there is a vegetated earthen berm which provides some screening of the current and future mining operation from Farm to Market Road and adjacent properties.

**6. Signage**

There is currently a “Trucks Entering” sign within the right-of-way of Farm to Market Road. All other signage meets the requirements of the Flathead County Zoning Regulations.

**7. Lighting**

All lighting appears to be downward directed and are turned off when the operation closes for the day except for minimum security lighting.

**Finding #8** – The proposed lighting and signage appears appropriately because the existing signage and lighting meets the requirements of the Flathead County Zoning Regulations.

**C. Availability of Public Services and Facilities**

**1. Sewer**

There is no sewage treatment system on the property. Portable toilets are used as needed.

**2. Water**

There is an existing irrigation well on the property that is utilized for both the agricultural production as well as for the gravel extraction operation.

**3. Storm Water Drainage**



Storm water within the boundaries of the gravel extraction operation is directed toward settling ponds on the pit floor. The storm water on the remainder of the property is absorbed on the property.

**Finding #9** – Sewer, water and storm water facilities appear to be appropriate because portable toilets are utilized as necessary, there is no other sewage treatment facility on the site; there is an irrigation well on the property that services both the mining operation and the agricultural use; storm water appears to be effectively managed on the site.

#### **4. Fire Protection**

The property is within the boundaries of the West Valley Fire District. Impacts to the fire district appear to be minimal. There are fire extinguishers on all of the equipment and water is readily available.

#### **5. Police Protection**

The property would be served by the Flathead County Sheriff's Department. It is anticipated response times in emergency would not be unreasonably long given the property's proximity to an urban, developed area of the County.

**Finding #10** – The proposed condition modification should not adversely affect fire and police protection because the West Valley Fire District will respond to emergency and there are fire extinguishers on the equipment and water is readily available on the site. The Flathead County Sheriff's Department will respond to any other emergency situations.

#### **6. Streets**

There is an existing 200-foot paved access off Farm to Market Road that will continue to provide access to the gravel operation. If this request is approved to add a batch plant to the operation, it is anticipated that there will be an increase of traffic generated from the facility during times of major road improvements needing asphalt. However, this increase in traffic will be relatively short in duration. Farm to Market Road is a secondary state highway maintained by the State of Montana and is classified as a major collector road capable of accommodating large amounts of traffic, including traffic generated from the site.

**Finding #11** – There appears to be adequate availability of streets for the proposed use because the property is accessed via Farm to Market Road which is a major collector maintained by the State of Montana.

### **D. Immediate Neighborhood Impact**

#### **1. Excessive Traffic Generation**

The subject property is accessed from Farm to Market Road. It is anticipated that during high demand for asphalt and concrete, traffic on the surrounding roads will increase. Recent traffic counts on Farm to Market indicate that the average daily traffic on the road is in excess of 6,500 trips. It is likely that during peak demand, traffic will increase by approximately 75-100 trips per day, an increase of approximately 1.5%. In addition, traffic counts on Church Drive east of Farm to Market Road indicate close to 5,000 vehicle trips per day. The increase in traffic due to the proposed batch plants appears to be approximately 2%.

**Finding #12** – Additional traffic generated by the proposed batch plant is expected to be minimal because the anticipated increase in traffic on Farm to Market Road is approximately 1.5% and the increase in traffic on Church Drive will be approximately 2%.

#### **Noise or Vibration**

A gravel extraction operation, by its very nature, produces noise and vibration. The addition of an asphalt and/or concrete batch plant should not increase the noise and vibration produced on the site. Moreover, the earthen berm and the hours of operation help mitigate the increased noise and vibration as a result of the activity on the site.

**Finding #13** – The noise and vibrations generated by the proposed batch plant is anticipated to be minimal because there is already noise generation from the approved gravel operation. The earthen berm and hours of operation are designed to mitigate the noise and vibration impacts to nearby property owners.

## **2. Dust, Glare or Heat**

Dust from the existing gravel operation is controlled by active watering of the site and by the paved 200-foot approach onto the site from Farm to Market Road. It is not anticipated that the proposed batch plant will generate more dust than what occurs on the site currently.

## **3. Smoke, Fumes, Gas, or Odors**

There are typically odors associated with the operation of an asphalt batch plant that are not generated on the site currently. The closest residence is located in the Lost Hills subdivision which is adjacent to the south of the proposed site of the batch plant.

**Finding #14** – The proposed uses are anticipated to have a minimal impact on the neighborhood as a result of dust, glare, heat smoke, fumes, or gas, or odors because the dust generated from existing gravel operation is controlled by active watering of the site and the 200-foot paved approach off of Farm to Market Road. It is there is a potential for impacts to surrounding property due to the odor associated with batching asphalt.

## **4. Inappropriate Hours of Operation**

The existing gravel extraction operation will continue to observe the original conditions of approval of FCU-05-07 as those conditions relate to hours of operation, including the proposed batch plant. Those hours of operation are 7:00 AM to 7:00 PM Monday through Friday and 7:00 AM to 2:00 PM on Saturday.

**Finding #15** – The hours of operation appear to be appropriate because the approved hours under FCU-05-07 which are 7:00 AM to 7:00 PM Monday through Friday and 7:00 AM to 2:00 PM on Saturday will continue to be required with the proposed batch plant.

# **V. SUMMARY OF FINDINGS**

**Finding #1** – The subject property appears to contain adequate usable space because the area which has been permitted by DEQ is approximately 80 acres which appears to be adequate for a asphalt and concrete batch plants as well as the on-going gravel extraction operation.

**Finding #2** – The access appears adequate because the access to the property will not change.

**Finding #3** – There does not appear to be environmental constraints on the property because it is not located within a Special Flood Hazard Area and there does not appear to be any other environmental constraints in the area.

**Finding #4** – Any future parking scheme appears to be acceptable because there will be a limited amount of on-site employees requiring parking spaces and the existing pit floor is approximately 30 acres.

**Finding #5** – The proposal appears to accommodate traffic circulation for the proposed use because there is ample room on the property for the limited number of vehicles to circulate in an efficient manner.

**Finding #6** – The proposed open space on the subject property appears adequate because when expanded, only 80 acres of the 160 acres will be under gravel extraction operations.

**Finding #7** – The current fencing/screening and landscaping on the subject property appears appropriate because there is fencing around the perimeter of the property and there is a vegetated earthen berm which provides some screening of the current and future mining operation from Farm to Market Road and adjacent properties.

**Finding #8** – The proposed lighting and signage appears appropriately because the existing signage and lighting meets the requirements of the Flathead County Zoning Regulations.

**Finding #9** – Sewer, water and storm water facilities appear to be appropriate because portable toilets are utilized as necessary, there is no other sewage treatment facility on the site; there is an irrigation well on the property that services both the mining operation and the agricultural use; storm water appears to be effectively managed on the site.

**Finding #10** – The proposed condition modification should not adversely affect fire and police protection because the West Valley Fire District will respond to emergency and there are fire extinguishers on the equipment and water is readily available on the site. The Flathead County Sheriff's Department will respond to any other emergency situations.

**Finding #11** – There appears to be adequate availability of streets for the proposed use because the property is accessed via Farm to Market Road which is a major collector maintained by the State of Montana.

**Finding #12** – Additional traffic generated by the proposed batch plant is expected to be minimal because the anticipated increase in traffic on Farm to Market Road is approximately 1.5% and the increase in traffic on Church Drive will be approximately 2%.

**Finding #13** – The noise and vibrations generated by the proposed batch plant is anticipated to be minimal because there is already noise generation from the approved gravel operation. The earthen berm and hours of operation are designed to mitigate the noise and vibration impacts to nearby property owners.

**Finding #14** – The proposed uses are anticipated to have an minimal impact on the neighborhood as a result of dust, glare, heat smoke, fumes, or gas, or odors because the dust generated from existing gravel operation is controlled by active watering of the site and the 200-foot paved approach off of Farm to Market Road. It is there is a potential for impacts to surrounding property due to the odor associated with batching asphalt.

**Finding #15** – The hours of operation appear to be appropriate because the approved hours under FCU-05-07 which are 7:00 AM to 7:00 PM Monday through Friday and 7:00 AM to 2:00 PM on Saturday will continue to be required with the proposed batch plant.

## **VI. CONCLUSION**

Upon review of this application, the request to allow for a condition modification to allow the operation of asphalt and concrete batch plants in conjunction with the existing gravel operation on the subject property is generally supported by the review criteria and the Findings of Fact listed above. Should the Flathead County Board of Adjustment choose to adopt staff report FCU-20-04 as Findings of Fact and approve the conditional use permit, the following conditions would ensure compliance with the review criteria and appropriate measures to mitigate impacts:

## **VII. CONDITIONS OF APPROVAL**

1. The gravel extraction operation is still subject to all applicable conditions of approval as outlined in FCU-05-07 and as modified by the Stipulated Consent Decree and Final Judgement.
2. Asphalt and/or concrete batch plants shall adhere to all requirements and regulations for such uses as required by the Department of Environmental Quality.

Planner: MM